85-530

Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor,
et al.,
Petitioners,

vs.

Magno J. Ortega,
Respondent

On Writ of Certiorari
to the United States
Courts of Appeal for
the Ninth Circuit

REPLY TO PETITION FOR WRIT OF CERTIORARI

Magno J. Ortega

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QUESTIONS PRESENTED

(1) Whether, during an administrative investigation, it is a violation of employee's civil rights protected under the Fourth and Fifth Amendments, to conduct a hasty "inventory" for self-incriminating evidence in a locked government office assigned to him for more than 17 years, search and seize all his papers, seal and store them as "Evidence, Napa County Sheriff's Department', refuse under the State Attorney General's official letterhead to surrender any on written demands of employee, re-examine what was hastily boxed for "rebuttal evidence" to threaten his witness, and show her semi-nude photograph at his hearing.

(2) Whether, after waiving their right to a jury trial (which was originally demanded for respondent) by petitioners' opting for a summary judgment in which trial judge misruled on the basis of the

Chenkin test, which the Court of Appeals reversed, government officials are entitled to another "bite" at a "good faith defense" (already discounted in the summary judgment) before a jury, after Court of Appeals correctly reapplied the Chenkin test and remanded the case to the District Court only on the issue of damages, and Court of Appeals denied their petition for stay of its decision while they decide whether to petition for writ of certiorari on grounds of "good faith".

LIST OF PARTIES

Petitioners:
Dennis M. O'Connor; Richard Friday;
Dorothy Owen; Stephen Donoviel.
Respondent: Magno J. Ortega

REAL PARTIES OF INTEREST: Pages

Dr. James Barter, ex-Acting Deputy Director, Department of Mental Health, Health and Welfare Agency, California 10,11

Dr.Joe Tupin, ex-Chairman, Department of Psychiatry, Univ. of Calif. at Davis 15,16,17

Mr. James Waller, Chief, Hearing Office, CSPB 7,17,21,24,25

Mr. Asher Rubin, Deputy A.G., 7,8,23,26
counsel for Napa in peon's
appeal against dismissal and
now SPB counsel in ex-peon's
petition for writ of mandate
for reinstatement as C.P.E.

Dr. Thomas Laskay, deceased 17,43,48,58
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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 764 F.2d 703 (1985). The Judgment of the United States District Court for the Northern District is not reported, but recounted below.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on June 27, 1985.

Stay to file this writ was denied and it is now final.

This Court has jurisdiction to review the lower decision or deny this petition for writ of certiorari.

APPLICABLE FEDERAL LAWS

1. U.S.C.A. Const. Amend. 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. U.S.C.A. Const. Amend. 5: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

3. 42 U.S.C. Sec. 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

(Exhibits [1-21] were petitioners' during past administrative hearing, Exx. [A-OOO] and [i-xxiv] are respondents'.

([I-VI] are days of hearing, [VII] was ordered on the 5th day:p.111/line3 or [V:111/3]: "complete your testimony in writing...")

1. Nature of the Controversy: Timing of (A, a-z) events/allegations and (B, 1-17) fact-finding/errors are both due process issues, intertwined below for brevity and accuracy.

A. HOSPITAL CONTROVERSY: DATES/EVENTS

a) Magno J. Ortega (respondent) sued "Napa" officials (petitioners) for violation of his civil rights when they (1) seized his Napa office before he left on

administrative leave without pay for one week -- (extended at his request to two weeks of "vacation") -- to investigate "coercion" of contributions for a computer, and (2) searched it without warning or warrant, (3) expropriated his property, packed and sealed them with tapes marked "Evidence, Napa County Sheriff's Dept.", (4) refused to return them, (5) re-ransacked them, (6) stole 10-year old souvenirs to "rebut" Dr. Sutton (Appendix A, [17-19]) and (7) withheld his salary checks for $11,128.95 unconstitutionally, for six months, after which they deducted the total cost of lost keys ($6.25) from $11,128.95 [i]. U.S.C.A. Const. Amend. 4, 5.

(Petitioner had to represent himself during the hearings and has no funds left for legal fees to answer this wanton petition. His reputation now damaged by "Napa", he has no income or credit to abridge court briefs below.)

b) Dr. Ortega as Chief of Professional

Education, State of California, had offices at home and at Napa for more than 17 years. There had been no grievances from or against him before the spring of 1981. He last received an annual merit raise of $3,648 on July 1, 1981 [i-d].

c) Dr. Ortega's psychiatric residents rotate to different training centers. They are not counted in any budgets based on hospital staff/patient ratios. His budget is separately approved from Napa's although Napa helps with the paper work.

d) Dr. Ortega's residents graduate every four years and cannot wait for the state to provide them with a computer. In March, 1981, they bought an Apple II plus micro-computer system [E] and had a letter-quality printer "to hook up with your Apple computer" donated on April 4, 1981 [15a-2]. Dr. Ortega secured a feasibility study [D] on March 18, 1981

from U.C., San Francisco for accessories (e.g. a Modem to link up with Stanford and UCSF) and drew up a computer training consultant contract on March 27, 1981. He showed both to Dr. O'Connor, whom he had trained but was "not an expert on computers" and was then hospital director at Napa. [II:89/10 - 90/4, III:137]

He is now director of developmental services in Sacramento. The real parties of interest then were Dr. Ortega's competitors who needed tenure in office or academia, or his training funds, or both.

The transmission of the contracts from Napa to, for approval by, the Department of General Services in Sacramento had been illegally delayed for the first time in 17 years.

e) On April 15, 1981, the last day to commit allocated moneys [J, V:8, 38],

Dr. O'Connor as the business manager's boss, approved the sub-purchase of accessories, including an Applewriter [13a], out of Dr. Ortega's budget.

1) Mr. Friday, the business manager, testified on 10/29/81, that he thought the Applewriter was a printer [I:112/6-25]. It is a word-processing program, not hardware. The sub-purchase order [13a] was not presented in evidence and its production ordered by court [H] on 11/2/81. But hearing officer, Mr. Waller, refused to call Mr. Friday [IV:7/2 - 10/4] as Dr. Ortega's witness to explain, among other discrepancies, where he can procure even a dot matrix printer for the $75.00 approved by Dr. O'Connor for the Applewriter.

(Dr. O'Connor had already "forgotten" [II:62/13] he had signed a thank-you note [15b] for the printer

donated to Dr. Ortega's program "to facilitate the dissemination of learning to all professionals".)

f) Dr. Ortega told Dr. O'Connor that Mr. Friday had not transmitted his computer training consultant contract as soon as he got them, as Govt. Code Sec. 14780 requires:

> "Every such contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of such approval."

2) Also at that first day of hearing, Napa's counsel, Mr. Rubin, tried to get Mr. Friday to say that the computer training contract was not approved. All Mr. Friday would say was that it had not been processed [I:119]. After Napa Superior Court ordered full discovery, an unprocessed copy [16a] was presented as "evidence".

(Another contract which had already

been processed and approved [16b-1,2], effective July 16, 1981, was produced during Dr. Ortega's cross-examination on 11/17/81. [III:48 - 52])

g) On May 22, 1981, Dr. O'Connor sent Dr. Ortega a memo: "Your contract for Professional Education's computer is being reviewed by Mr. Friday. . . see him and discuss this contract." Mr. Friday asked for the serial numbers in case of equipment theft and promised prompt transmission of all contracts.

"Finding" IX, A-13 of petition, -- (that Dr. Ortega "mislead the Executive Director" into believing the equipment was donated to the hospital) -- cannot stand unless Dr. O'Connor had also forgotten above memo [D-1].

(When cross-examined during Dr. Ortega's appeal against dismissal, "In all the time you knew me as

Chief of Professional Education, have you been misled by me?" his reply was "Only you know that." [II:112/22-24])

h) Dr. O'Connor also approved the sub-purchase order [13b] for a Modem to link the residents' training computer to both Stanford University and UCSF. [II:93, V:17]

Dr. Ortega's post-graduate training program was the only one in the West Coast that was affiliated to two major universities. [III:69. 71, 75, 122]

Some U.C., Davis graduates already prefer Dr. Ortega's residency progam to their alma mater's post-graduate psychiatric training. Modem linkages excluding UCD would keep it behind as a second-class training program for good. [III:137 - 138, 142]

The then Acting Deputy Director of State Mental Hospitals was on academic

leave from his position as UCD Director of Residency Training and had been pushing hospital research.

Dr. O'Connor's immediate predecessor as hospital director (Dr. Linn) testified on Dec. 30, 1981, about the then UCD Director of Residency Training:

> "Well, I do recall one incident at, when he was working for University of California at Davis, involved with obtaining funds for their training programs that he admitted to me that informally that his main purpose was to obtain sufficient money from residency programs throughout the State to keep his own training program going." [V:35]
>
> (The Acting Deputy Director never became more than Acting Deputy Director.)

i) On June 19, 1981, Dr. Ortega placed a resident, Dr. Vaughn on a month's leave of absence or less, without pay, effective 7/1/81 (he would automatically be terminated if he was A.W.O.L for five consecutive days). He had been reluctant to return to his medical rotation in Oakland's Highland Hospital to

compete with younger doctors, and had used up his sick leave to recover from recent irregular heart-beats. He continued to attend some of Dr. Ortega's training sessions, but he was told he should be in his assigned rotation if he wanted to get a medical license in California [IV:57/25]. (He had lost his first automatically on conviction of fraud 8 years ago. [I:47])

j) On July 17, 1981, he received a small stipend for July and a notice that his leave expires in six months or 1/8/82 instead of 8/1/81 and that he must see Dr. Ortega if he wanted to return earlier [4]. Dr. Ortega told him the expiration date was a typographical error but he must return the check. [I:52]

His wife's boss who is a lawyer wrote the hospital, claiming he had not intended to be away for six months, and should be paid in full [3a, IV:54]. Dr. O'Connor's subordinate (Mr. Donoviel)

talked to Mr. Friday's Personnel Officer (Mrs. Owen). Between them and without authorization, they reinstated Dr. Vaughn in exchange for Dr. Vaughn orally expressing misgivings about residents contributing to get a computer. (He was not asked to contribute by the other residents. [I:58, 98, III:104])

Dr. Vaughn testified on 10/29/81 that he waited while Mrs. Owen and Mr. Donoviel talked:

> ". . . He asked me if -- if I would allow him to proceed (sic) me in speaking to Mrs. Owens about five minutes, and I said certainly and so he proceeded me talking to Mrs. Owens. And then I went in and Mrs. Owens could not have been more polite, . . . and told me not to be alarmed; that they had a way of dealing with this and that I would receive my check in very short order." [I:55/24 - 56/26]

Mr. Donoviel himself testified three months later, on 12/29/81, that

> "I suggested that Dr. Vaughn go directly to Mrs. Owen about his complaint of not being paid for I believe it was a month's service.

And that event, that package, tripped off further comments about your conduct and that led to the investigation." [IV:40/14 - 41/18]

(Hearing reporter omitted "deal" after "package".)

Non-parenthetically, Mrs. Owen has since asked to "retire". (Then Mr. Rubin sought to dismiss petition for writ of mandate to reinstate Dr. Ortega because she had "retired".)

k) On Wednesday, 7/29/81, Mrs. Owen reported [7] to Dr. O'Connor that Dr. Vaughn "felt the decision not to allow him to change his rotation period and work here during the month of July was a way of reprimanding him." (The official hospital investigator's vacation was to start the following Friday, 7/31/81.)

Dr. Vaughn testified three months later that this was "pure speculation on my part" and when recalled to the witness stand on the afternoon of 10/29/81 -- (after Dr. Ortega had postponed cross-examining

all witnesses pending full discovery,) -- would go no further than "I wondered what would be the consequences of not making said voluntary contributions". [I:58, 98]

1) Dr. O'Connor asked to see Dr. Ortega on 7/30/81 and he arrived just as the UCD Acting Chairman, Psychiat. Dept., was leaving. Dr. O'Connor asked Dr. Ortega to go on a week's unpaid administrative leave from July 31, 1981 while the charge of coercing his residents to buy a computer can be investigated. (His salary for that week will be reimbursed if the charge was groundless.)

(The Notice of Punitive Action [vii] did not charge coercion and no one testified that there had been, vs. "Finding" VI [ix].)

UCD had just lost its federal training grants and wanted unspent and uncommitted state funds. Dr. Ortega did not want to refuse their assistance in

training or research as redundant because his residents have arranged computer access to other universities. Fewer questions will be raised if he was on vacation rather than administrative leave and Dr. O'Connor agreed. (Dr. Ortega was in effect spending his own money to keep his budget untouched.)

On Nov. 16, during Dr. Ortega's cross-examination [II:126], Dr. O'Connor remembered:

> "You thought that it would not look good, in light of the university and so on, and you asked me instead of going on administrative leave, would it be permissible to allow you on vacation . . . for two weeks. . . I was initially talking about a period of about a week."

After offer of proof that the hearing officer insisted on, Dr. O'Connor admitted [II:80 -82] that

> "I do recall talking to you that I was concerned because the person that I had talked to -- I'm not sure if it's important to mention his name -- was, in fact, the person -- I don't want to personalize -- (who) had tried to cannibalize our program in the past."

On further questioning, he reported that

"(S)ome of the positions were taken away from us, and we're now developing tactics, which I hope don't go outside of the room at this time, to gain some of the money that was stolen from us by the university".

(That UCD Acting Chairman, Psychiat. Dept., is no longer its Chairman.)

3) Later, the hearing officer apologized to Dr. O'Connor for allowing a lengthy cross-examination! Later on, and prematurely -- (and permanently) -- he "excused" Dr. Laskay to call Dr. Ortega for cross-examination himself!! [III:21 -22]

(It was Dr. Laskay who testified from memory [II:168 - 170] on 11/16/81 that Dr. O'Connor had forgotten he had signed the thank-you note to the printer's donor, that they searched Dr. Ortega's office and "among other things, yes" they were "looking for instances of

forgery". [15a-1!])

m) Dr. Ortega protested [VII:76, 137] against the investigating team including Mr. Friday and Dr. Laskay, whose application he had initially turned down unless he started training without a stipend. Dr. O'Connor thought that the team may be irregular but that Dr. Laskay was O.K. [IV:54 - 55]

n) After telling Dr. Ortega's residents that he went to all out-of-town rotations even if he did not care to commute, Dr. O'Connor said that, for the first time, two people had complained about Dr. Ortega in writing. [T-2,3] There will be an investigation of his management practices for a week, but Dr. Ortega will be away on a two-week vacation. [R]

o) The Chief Resident, Dr. Gandhi, declared in her affidavit to District Court that Mr. Friday was talking to Dr. Ortega's secretaries when she arrived at

Napa on Friday, July 31, at 0800, telling them [T-2] that the locks had already been changed (even before Dr. Ortega was officially on "vacation").

p) Two weeks from that Friday, but effective the following Monday, Dr. O'Connor extended Dr. Ortega's leave indefinitely with the option to continue on "vacation" [S] if he wishes.

(Dr. Ortega was therefore not under any obligation to be away from the hospital even on Aug. 16, 1981.)

He stopped by Saturday, Aug. 15, to bring the computer home to use. His Napa office key did not work, but the computer room's lock had not been changed. (It turned out that Mr. Friday had been reading Dr. Ortega's old love letters that he keeps locked in a drawer in a locked desk in his Napa office. [Deposition, p. 26])

q) Napa knew that Dr. Ortega took the computer home every week-end, but Mr.

Friday took the serial number to the District Attorney's office for a court order to bring it back to the hospital. Since it was not hospital equipment, his leaving the computer room unsecured did not embarrass Dr. Ortega. (But it should embarrass petitioners who claim it is their job to secure what is being investigated and must lock up the "evidence" even if no resident alleged coercion to get the equipment.)

r) On Aug. 28, 1981, Dr. O'Connor called Dr. Ortega to say there were serious charges against him that he did not want to go into specific details about over the phone, but that Dr. Ortega can opt [II:83] to resign. Dr. Ortega refused with a laugh and Dr. O'Connor withdrew his promise to discuss the matter personally, in violation of the State Supreme Court decision in Skelly v. State Personnel Board (1975) 15 C2d 194:

"6. Preremoval safeguards for a

permanent civil service employee must include as a minimum, notice of the proposed action, the reasons therefor, a copy of the charges upon which the action is based, and the right to respond, either orally or in writing to the authority initially imposing discipline." [II:1, 66-67]

s) Dr. Ortega had then asked to see Dr. O'Connor's own superior in Sacramento by writing [N] to the State Personnel Board (SPB) on 8/31/81, to protest his dismissal without written notice.

4) Instead of referring his letter to the Secretary of Health and Welfare which the SPB chart of grievance channels [xiv] shows is the next step if a grievance is unresolved, it deliberately misinterpreted Dr. Ortega's protest about unwritten charges as an appeal [N-1] against a carelessly padded [I:89] Notice of Punitive Action [vii], dated 9/14/81, effective 9/22/81. (A two-week notice would have taken it to 9/29/81.) Hearing was hastily set

for 10/29/81, before Dr. Ortega can ask the court for an order to discover documents that had not been received in 30 days:

> Calif. Admin. Agency Practice, 1970, Sec. 2.41, p. 82, PROCEDURE FOR INVOKING DISCOVERY: "Theoretically, the hearing could be set before the expiration of the 30-day period in which a request for discovery could be made. However, in practice this rarely occurs because the calendar of the Office of Administrative Procedure is such that most hearings are set 60 to 90 days after service of the initial pleading. An additional pleading might be filed less than 15 days before the administrative hearing, in which instance a party might be entitled to a continuance to allow him the full 15 days in which to request discovery."

t) Dr. Ortega asked Napa [X,Y] in writing to return all his personal property, but was ignored.

u) The week before the hearing, Dr. Ortega received an anonymous phone call warning him that he could default in the hearing if he were arrested for Medi-Cal fraud and cannot obtain a "good cause" continuance. He asked the court [L] if he

could be released on habeas corpus if that happened. It did not, if only because it would have been a false arrest. Otherwise, the caution was well taken:

> Govt. Code Sec. 19579: Failure of the employee to appear at the hearing shall be deemed withdrawal of his answer and the action of the appointing power shall be final.
>
> (But it is obvious [xxi] that Dr. Ortega's medical files are still being "re-searched".)

v) On October 20, 1981, counsel for Napa (and now for the State Personnel Board in Dr. Ortega's petition for writ of mandate for reinstatement, Mr. Rubin), acknowledged [W, I:91] illegal search of papers.

> "All of them are available for your inspection at the hospital. We must respectfully deny your request however that any of the documents be suppressed or returned to you."

w) On Oct. 23, Dr. Sutton wrote the hearing office protesting Dr. Ortega's dismissal. (Appendix A, [P]).

B. HEARING CONTROVERSY AND ERRORS

5) Before the hearing was called to order on Oct. 29, 1981, the hearing officer, Mr. Waller, who is also Chief, Hearing Office, SPB, was heard [M] to predict, "Oh, we have what we need here, this won't take long".

6) Another charge [vi] was substituted to amend the Notice of Punitive Action on the eve of the hearing, and Dr. Ortega asked for a continuance but was refused and promised he could call all the witnesses back instead. Appendix C (App-11), [I:7, 37, 43, 79, 90, 121-4].

7) Another charge was dropped [I:9 - 11] and by noon it was obvious that the hearing was not going the way it was supposed to go. Chief Hearing Officer Waller spent the lunch recess [I:71] changing other hearing schedules so that Napa's can resume on 11/4-5/81.

(When Dr. Ortega was told that the hearing would resume in a week, he

decided [I:80, 88] he can wait that long to cross-examine the rest of day's witnesses.)

8) Mr. Waller found out that Dr. Ortega had petitioned the court for discovery and proclaimed [I:80], pounding the table for emphasis, that "This hearing is discovery", and then started scribbling notes while barely attending to the proceedings. (What inferences are invited?)

(He must be summarizing the morning's findings. He did not remember well enough: the last complainant was a student [vi], not the social worker he cited in his Proposed Decision [ix]. Unless he wanted to extend to her the protection against sexual discrimination between employees in order to dismiss Dr. Ortega who is not even her supervisor. She had graduated years before the hearing [I:39] and was not employed

at Napa. Which the unsubmitted Notice of Punitive Action [vi] would have told this Court.)

x) On Oct. 30, 1981, over the week-end before the court hearing on Dr. Ortega's petition for full discovery, he got another letter [JJ-2] from Mr. Rubin, telling him that he had "evidence" from Dr. Ortega's papers to counter any testimony of support from Dr. Sutton:

> "If you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. Because of your tardy response to our request, we have been unable to ascertain which documents will be needed to counter Dr. Sutton's declaration. In the interest of fairness, however, we are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination."

(Dr. Sutton was Chief Resident during Dr. O'Connor's senior year as psychiatric resident, and Dr. O'-

Connor told her before dismissing Dr. Ortega by phone, "I always thought you were in love with Dr. Ortega." On his cross-examination of Dr. Sutton, Mr. Rubin's "rebuttal" consisted of [17] her semi-nude photograph as a model, [18] a self-composed Valentine Card, and [19] a classic book of poetry about love that she had sent to Dr. Ortega 10 years before.)

The judge who heard Dr. Ortega's petition for discovery, expressed doubt about how a picture [17] of the witness could "rebut" her assessment [P] of the sustained effectiveness of Dr. Ortega's training program.

y) The court ordered on Nov. 2, 1981 that [H] missing documents and all investigative notes as well as Mr. Rubin's "rebuttal" evidence be furnished Dr. Ortega.

9) That same morning, Mr. Rubin asked for

a continuance [II:3]. Mr. Waller reworked time slots without any consultation with Dr. Ortega and granted Mr. Rubin a miscontinuance. A newshound heard about it from Mr. Waller and told Dr. Ortega when he called him to ask how he will defend himself from what Mr. Waller heard on the first day of the hearing. The date was already set when Dr. Ortega went to the Hearing Office to request subpoenas [JJ-3] in his handwriting for 11/4-5.

10) Despite repeated written requests, not a single subpoena was issued [II:143], in violation of Govt. Code Sec. 19851:

> "The board or its authorized representative shall issue subpenas for witnesses for the employee upon his written request and at his cost. The board or its authorized representative may request such costs to be prepaid."

11) Two weeks after the court ordered discovery, Mr. Waller talked Dr. Laskay [II:150] into testifying from memory, after Mr. Rubin told Mr. Waller that the

law does not intend for his notes to be shared even if the court ordered it.

(Months after Dr. Laskay died, the Attorney General sent his notes to petitioners' Federal District Court Judge. [First Amended Petition for Writ of Mandate, p. 31])

12) On Nov. 17, 1981, Dr. Ortega's cross-examination of Dr. Laskay was interrupted with Mr. Waller asking Mr. Rubin if Dr. Laskay was their last witness. When Mr. Rubin confirmed that "that concludes our case", Mr. Waller excused Dr. Laskay with "I think he has testified long enough". [III:21 -22]

13) Even after Mr. Rubin said they had "completed our case", Mr. Waller still felt the need "to identify what are the real issues in this case". He did not ask Mr. Rubin to re-open his case but called Dr. Ortega as his own witness [V:96] and suggested questions to ask as Mr. Rubin cross-examined him, at his

suggestion, in violation of Evidence Code Sec. 776:

> "(a) A party to the record of any civil action . . . may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by party calling the witness." (The wording is clear.)
>
> (The umpire, who had specifically cited Evid. Code Sec. 776 as his excuse, thus identified himself as an adverse party. Cf. Appendix B, [IV:3 - 9].)

Dr. Ortega was cross-examined despite his protest [III:21 - 25] that his own witnesses were waiting to testify.

z) Acting as his own counsel, Dr. Ortega forced Napa to produce [III:48 - 51] after an unscheduled recess the computer training contract that was approved for twice the amount requested in the one that was withheld from processing. (This thus contravenes Mr. Waller's "finding" that Dr. Ortega was

extravagant. See also App-3, Dr. Sutton's declaration, par. 2.)

14) Mr. Waller kept postponing the time to call state witnesses as Dr. Ortega's, and then finally refused to subpoena anyone or even call to the stand those who were on hand who had previously testified, including Dr. Gandhi, the Chief Resident that year. Appendix C. (Dr. Gandhi, pre-empted as state witness [I:90] as soon as Dr. Ortega postponed cross-examinations that first day of the hearing, mocked poor Mr. Rubin [I:95] and was denied as Dr. Ortega's last witness. App-14 [V:91].)

15) When Dr. Ortega took the stand himself to testify on 12/30/81, he was again interrupted [V:110 - 111]. Mr. Waller found it

> "a(n) intolerable burden, no question and answer format, which is the normal procedure for taking testimony for a hearing reporter, I'm going to give you an opportunity to

put your testimony in writing, and then I'm going to take a look at it and Mr. Rubin can take a look at it, and then we'll reconvene for the purpose of cross-examination, if any." (What is being telegraphed?)

16) Dr. Ortega was promised that his written testimony would be copied and distributed to all who have been faithfully attending the hearings, but ordered in no uncertain terms to submit his testimony in writing over his objections (and suggestion that someone ask questions [V:110] which he will write out.

Hearing Officer: . . . When I receive th testimony in writing, then I'll set an additional hearing date at which time we limit the hearing to Cross Examination, if any, and rebuttal testimony, if any.

Dr. Ortega: And (re)rebuttal?

Hearing Officer: Yes, but (re)rebuttal is limited to what's presented on rebuttal. We're not reopening this case.

Witness: I understand that. I understand that.

Mr. Rubin: Mr. Hearing Officer, Dr. Ortega --

Hearing Officer: Perhaps we can handle this off the record.

Mr. Rubin: Yes, sir. [V:111]

17) Off the record, the decision not to (i) rebut now or (ii) rehear later (or re-open their "can of worms") was forged. (One now sees the subterfuge. [VI:2 - 5])

(For an earlier example of unmistakable collusion, see Appendix B. [IV:3 - 9])

i) Mr. Rubin asked for a postponement of the hearing before it resumed on Feb. 16, 1982 [viii], but Mr. Waller advanced it instead to Feb. 2, 1982, and could only distribute the copies of Dr. Ortega's testimony just before the hearing was called to order. Dr. Ortega went back to the witness chair but Mr. Rubin did not have any cross-examination questions. As Dr. Ortega was about to complete his testimony and present more exhibits in evidence, Mr. Waller hur-

riedly adjourned the hearing. (His court reporter had already started packing as soon as Mr. Rubin said he had no cross-examination questions.)

> "Well, I think what I'll do in order to be fair to both parties, or at least attempt to be fair with both parties is, we'll consider the testimony concluded; however, I'll hold the record open for another fifteen days and at that time you can submit all of the exhibits or any additional testimony that you want to present, Dr. Ortega. And I'll request that you give a copy of it to Mr. Rubin. At the end of fifteen days, I'm going to consider the record closed. At that time I'm going to prepare a proposed decision for the California State Personnel Board. The decision will be in writing; the decision will contain findings of fact; the decision will be mailed to all the parties; and it will be the decision of not just the Hearing Officer but it will be the decision of the California State Personnel Board. And under those circumstances, I'll consider the case submitted." [VI:4-5]

Dr. Ortega was left on the witness chair waiting to testify (he had already been sworn in before [V:95 -96]).

ii) The decision of the Board was then expectable around the end of February,

since the Board has ten days to distribute the Proposed Decision before acting on it, under Govt. Code Sec. 19582 (b):

> ". . .A copy of the proposed decision shall be filed by the board as a public record and furnished to each party within 10 days after the proposed decision is filed with the board. . ."

The hearing officer who seemed to be in a hurry (App-34) to finish did not file his Proposed Decision [ix] until March 8, 1982, but it was not distributed at all. The Board adopted [x] the Proposed Decision on March 17, 1981.

It would not have taken much to drop a copy of the Proposed Decision in the mail. Why were the explicit provisions or implicit intent governing Disciplinary Proceedings disregarded? The answer is not hard to find.

In the Notice of Punitive Action [vii] that petitioners did not submit, there was (App-21) no charge that Dr. Ortega

was arrogant or coercive, no allegation that money was spent that had not been approved or allocated, no complaint of threats to supervisees, female (A-23) or ex-con. Yet Dr. Ortega was dismissed for being arrogant (A-30), abrasive (A-29) yet deceptive, coercive (A-31) and extravagant (A-3), discriminating on the basis of sex, and retaliatory towards an ex-con (A-32, -33). [I:58, 71, III:74, VII:173, 445-462]

In preparing to petition for a rehearing, Dr. Ortega found the record had not yet been transcribed and could change the mind of the Board. Especially after another hearing officer suggested getting a lawyer, which cost half Dr. Ortega's withheld salaries. But even then, a rehearing was denied. Puzzled, Dr. Ortega studied the record [IV:19] of denied petitions for rehearings and found that non-Caucasians charged by Caucasians with sexual

harassment and heard by miscegenophobes never even got a proper hearing. (Caucasian miscreants got off with counseling, even if their victims were non-Caucasians.) With little left afterwards for legal assistance in frivolous court skirmishes (Appendix G), it is work-saving to the still employed and/or bigoted (App. E) to encourage petitions for rehearings.

The rest is as stated in petitioners' untruthful "Nature of the Controversy".

2. The Proceedings Below

Petitioners claimed in Federal District Court that the SPB decision was not appealed. It is still under appeal because of false findings (Appendix C) in the Proposed Decision appended by petitioners and the reversible errors (I - XIII) in the administrative proceeding itself (Appendix E).

In federal court, petitioners had opted for a summary judgment instead of the

jury trial demanded for Dr. Ortega. The trial judge did not find a "good faith" defense but decided, wrongly, that they met the Chenkin test. On Dr. Ortega's appeal (Cf. Appendix A for an updated brief), the Chenkin test was applied correctly. Petitioners lost.

For petitioners to assert that the Court of Appeals ruling in favor of Dr. Ortega was in conflict with other decisions (which it took into account in its "de novo" review) is either a misreading of their own old citations (iii - viii, below) or a frivolous, time- and money-wasting allegation to exercise petitioners' indefensible "right" to be heard just for the sake of the exercise. Please see paragraph #8 of (viii) Butz v. Economou, below.

ARGUMENT

[Dr. Ortega has not been able to find two decisions referred to in petitioner's argument that the Court of Appeals erred and must be reversed. They were not cited in the

proceedings below. Respondent is unprepared to counter any argument based on what is misreported as (i) MANCUSI v. DE FORTE (1968) 392 U.S. 364, and (ii) WALLACE v. CHAPPELL (9th Cir. 1981) 661 F.2d 719. He hopes that California statutes cited herein and in state court petition for reinstatement, with which petitioners are familiar, will make up for his ignorance and submits them instead for their rebuttal.]

All the decisions (iii-x below) listed by petitioners speak for themselves, in paragraph after numbered paragraph (all true relevance to the instant case are added inside parentheses or in the following paragraph), against their arguments that a writ of certiorari should be issued as automatically their due.

I

VERY BAD CASES MIGHT MAKE BAD LAWS

GOOD CASES SHOULD MAKE GOOD PRECEDENTS

INTRODUCTION

"A man's feelings are as much a part of his personality as his limbs." Dean Pound in 28 Harvard LR 343, 363.

Dr. O'Connor depended on his co-petitioners as appendages, and Dr.

Ortega on his trainees for a third ear. On Sept. 2, 1981, when the residents and faculty as a body protested Dr. Ortega's peremptory dismissal, Dr. O'Connor told them that (1) he hopes he will still be invited to Dr. Ortega's house in the future but that (2) Dr. Ortega will never be able to come back to the Professional Education Department, (3) Dr. Ortega will lose his retirement benefits for refusing to resign, and (4) Dr. Ortega will need to go to the Supreme Court to be reinstated. [T-1, -2, -3, IV:60]

Dr. O'Connor was delivering a covert message which was transmitted that (1) his hands may be tied, but (2) having heard Dr. Ortega say that he expected to die like his father from a stroke, he has little time left to fight, (3) the unwritten charges will be a virtual indictment for fraud which would automatically

disqualify Dr. Ortega from receiving his employer's contribution to his retirement pension (which was why the Notice of Punitive Action [vii] did not charge coercion at all, since forcing rules out lying), and (4) that it costs the hospital nothing at all to take the case all the way to the Supreme Court.

(Dr. Ortega will therefore now throw himself at the mercy of this Court and only argue against what petitioners have presented below as precedents in their favor to prove that their exercise of their right to a review is frivolous.)

II

PLAINTIFF'S EXPECTATION OF PRIVACY IN A GOVERNMENT OFFICE WAS REASONABLE, HAD BEEN RESPECTED FOR ALMOST TWO DECADES AND COULD NOT HINDER WHAT PETITIONERS SAID THEY WERE OFFICIALLY INVESTIGATING

The law has evolved slowly but steadily from physical protection of person and property rights to protection of personal liberty, including the free-

dom to be let alone.

iii) WILLIAMS v. COLLINS (8th Cir. 1984) 728 F.2d 721:

> 6) Denials of absolute liability to government officials are appealable when entitlement to immunity are sufficiently free of fact question as to present question of law.

The instant case, even with petitioner's sterilized and incomplete version of the "Nature of the Controversy", is not sufficiently free of fact questions. (A-1, Essential Lies, etc.)

> 10) Defendants were entitled to absolute immunity only for common-law liability for defamation, search (not seizure [17-19]) reasonably calculated to help investigation or simple inventory of material was within line of duty and defendant's had duty to investigate and remove employee if necessary.

The duty to remove any permanent employee must be for cause and exercised with care. The duty to investigate any charges of forgery and fraud mandated the use of the official Napa investigator (who just happened to be on vacation the very week that Dr. Ortega was

forced to take his), who was a specialist duly assigned to the hospital specifically to investigate such matters [V:42]. The reason for such detached assignment is precisely to disinvolve interested amateurs, especially those who had any untoward resentment (e.g. Dr. Laskay [III:111]), or against whom had been lodged an earlier grievance (i.e., Mr. Friday). [VII:76, 102, 147, 165, 173] The professional investigator is required to supervise everything from the start, especially if administrative leaves are involved, with or without pay. App-34. (Instead, Mr. Friday bossed other amateurs. Dr. O'Connor tried to get a legally trained and experienced administrator/alienist but he was outvoted by his co-petitioners.) [V:47]

iv) UNITED STATES v. NASSER (7th Cir. 1973) 476 F.2d 1111:

> 18) Circular was not directed at surveillance in course of internal investigations.

In the case before the Court not even a circular was available to support ad-hoc policy of taking "inventory" when peon was still employed.

v) UNITED STATES v. COLLINS (2nd Cir. 1965, not 1963) 349 F.2d 863:

> 5) Court properly relied on ruling made on motion to suppress where no other evidence had been offered to suppress on ground that search and seizure of defendant's work jacket was unreasonable.

Petitioners seized everything [W, JJ-2] and presented old souvenirs [17-19] as "evidence" against respondent's witness.

> 6) When defendant was handling valuable mail for which government was responsible, search of defendant's desk was constitutional exercise of power of government as employer to supervise and investigate performance of customs employee.

The computer during weekdays was housed away from Dr. Ortega's office in the hospital. Dr. O'Connor was trained by Dr. Ortega and has insufficient experience to supervise Dr. Ortega's performance. (Dr. O'Connor, in fact,

asked other faculty in Dr. Ortega's program to evaluate a copyrighted manuscript that has, to date, not been returned to Dr. Ortega. His faculty, as might have been expected, refused to abridge academic freedom to teach what may not yet be written up elsewhere.)

[Ms. had not been word-processed and had to be reconstructed mostly from memory.]

9) Room in which defendant's jacket was hung was his supervisor's outer office, which was public area not shown to be segregated for private purposes from other work areas.

Dr. Ortega's office lock had to be changed to exclude him and facilitate search before he returned from "official" vacation [T-2] and before he fetched the computer (from another office which can be opened by all the residents), as he usually does on weekends. [S] (Napa knew that, claimed to be concerned about "evidence", but did not secure the computer against removal. Was this an amateurish attempt at

entrapment to charge Dr. Ortega with "stealing" his own equipment or with obstructing justice, by secreting "evidence"?)

10) Where the jacket glowed because of detection dye, agents had "probable cause" to suspect defendant and arrest him.

Dr. Ortega was not suspected of taking the computer. (He told his secretary [10] he had it at his office at home.)

12) Customs agent had authority to demand of any person within 3 miles, necessary assistance in making arrest, search and seizure.

Hospital investigators delivered by hand to Dr. Ortega's office at home a memo dated Aug. 14 [S], extending his administrative leave indefinitely effective Aug. 17, the same morning his secretary had told them Dr. Ortega called to ask whether he had appointments that morning, and that [10] he had the computer over the week-end. (No questions were asked about the computer, only that Dr. Ortega would be expected

to answer questions in the course of the extended investigation. Dr. Ortega's permission or his cooperation was not solicited in making their secret "inventory" of his papers, since he was not yet dismissed.)

vi) SELLARS v. PROCUNIER (9th Cir. 1981) 641 F.2d 1295:

> 3) State parole board officials enjoy some degree of immunity as political appointees of the Governor.

None of Napa officials sued are political appointees. They are all employees who had to compete in examinations to be appointed. All state employees past the six month probationary period after passing the competitive examinations can be dismissed only for cause. (The search did not discover cause for dismissal.)

> [Parenthetically, this also means that if Dr. Ortega were the appointing power for Dr. Laskay (whom Dr. O'Connor made acting medical consultant), or for the complainants of sexual harassment (neither of whom was a regular employee), he

could dismiss them over something trivial and not be held accountable for discriminatory practices, fantasied or factual. (Dr. Laskay suspected that he was initially turned down by Dr. Ortega for being a homosexual. Dr. Ortega denies their allegations and they are not supported by any one else. [VII:102, 137, 173, 453 - 462])]

4) State parole board officials perform functionally comparable tasks to judges.

Dr. O'Connor cannot judge Dr. Ortega's performance. (He even admitted, once, after the hearing, that he had "no right to oust Dr. Ortega".)

vii) HARLOW v. FITZGERALD (1982) 457 US 800:

4) Under "functional" approach to immunity, immunity of government officials extends no further than its justification warrants.

Inventory-taking does not include seizure and expropriation of private property in violation of the Fourth and Fifth Amendments. [I:91, W, JJ-2, 17-19] (Once qualified immunity is denied, actual damages must be automatic, only punitive damages to be assessed by a

jury.)

8) Qualified or "good faith" immunity is affirmative defense that must be pleaded by defendants.

Petitioners' simple assertion cannot persuade when actual conduct was an exceptionable display of "bad faith". (And defeat of "good faith" defense should render victim immune from frivolous petitions to review the issue before a jury.)

viii) BUTZ v. ECONOMOU (1978) 438 U.S. 478:

7) All individuals are subject to federal law. Officials must bear the burden of showing that public policy requires exemptions of that scope.

The burden does not imply the right to appeal when the showing was not persuasive to the lower court.

8) This burden, when discharged, entitles them to qualified immunity, except where it is demonstrated that absolute immunity is essential for the conduct of public business.

The burden must be discharged, and only then can the decision be appealed

in order to be granted absolute immunity. (Petitioners failed to prove entitlement to any immunity, and that is why no claim for absolute immunity can be or is being advanced.)

ix) CHOCALLO v. BUREAU OF HEARINGS AND APPEALS, SSA (E.D. Pa. 1982) 548 F. Supp. 1349:

> 19) When sole purpose of search of offices was work-related and reasonably forseeable by plaintiff who had refused active efforts of her supervisor to locate and remove case file, which was government property, . . . two administrative law judges . . . entering and searching former administrative law judge's office to obtain file did not amount to violation of former law judge's Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

What was removed was not work-related. The search was covert. Mr. Friday in his deposition [p. 26] admitted going to Dr. Ortega's office after office hours and poring over his files. Dr. Ortega does not know what in his files would keep Mr. Friday reading for hours but old love letters in locked files probably opened by the same locksmith who

changed the door lock. (Mr. Friday's curiosity is very curious. There was no reason to change Dr. Ortega's office door lock before the secretaries arrived at 0800 hours. [T-2])

> 24) When director communicated to plaintiff the basis for non-promotion was discipline-related, director had authority to recommend adverse action for plaintiff's actions which were deliberate impediments to execution of delegated authority, although director erred in not processing plaintiff's promotion or grade increase.

CSPB rules, in fact, require progressive disciplinary measures before disapproving salary increments. No such scenario even approaches the capricious investigation and arbitrary administrative leave against specific provisions of California Govt. Code Sect. 19574.5 limiting unpaid leave of absence to 15 days and only for:

> "misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude".

[II:85 - 88, V:17, 47-48]

(Moral depravity was never charged, but could be lodged against petitioners, with their many legal perversions.)

> 26) When plaintiff did not indicate what documents, if any, were improperly collected and disseminated, nor indicate manner in which defendants collected such data, complaint of violations of Privacy Act that were not relevant and necessary . . . was subject to denial. (Undeniable in instant case. [17-19])

Dr. Ortega's medical files of private patients were scrutinized, even old files of out-of-state patients used for teaching residents, and rumor was leaked out into the medical community [xxi] just before the hearing that Dr. Ortega would be arrested for Medi-Cal fraud. (More sophomoric than this "brief" is the Notice of Punitive Action [vii] as a thesis on fraud, without calling it that in order to keep the disposition in the hands of the State Personnel Board. App-21.)

Not only was second use of information

prohibited by California's own Privacy Act, its Govt. Code Sec. 11183 also provides that:

> "Except in his report to the head of the department or when called upon to testify in any court or proceeding at law, any officer who divulges information acquired by him from the private books, documents or papers of any person while acting or claiming to act under any authorization pursuant to this article -- (Article 2. Investigations and Hearings) -- in respect to confidential or private transactions, property or business of any person is guilty of a misdemeanor and disqualified from acting in any official capacity in the department".
>
> 29) Any liability for violation of Privacy Act rests only upon agency and not individuals.

(That the amateur investigators automatically disqualified themselves can be pursued in California State Court.)

Yet petitioners' conduct does not only violate the Federal Constitution but offends and shocks the conscience [xxi] of concerned Bay Area citizens, who warned Dr. Ortega of his rumored impending arrest.

x) CHENKIN v. BELLEVUE HOSP. CTR. N.Y.C. ETC. (S.D. New York 1979) 479 F.Supp.

1349:

1) Does the person claim a reasonable or a legitimate expectation of privacy that has been invaded by government action? (The Court of Appeal said "Yes".) Did the individual's conduct evince an actual, subjective expectation of privacy? (The Court of Appeals said "Yes".) Is that expectation, when viewed objectively, justified under the circumstances? (The Court of Appeals said "Yes".)

2) Even in airport lobbies, people still retain some justifiable expectation of privacy in their belongings.

Private and official cars parked on public property are not subject to search and seizure, absent compelling reasons, like hints about a hidden explosive from reliable terrorists. (Only then can an ex-con qualify as compelling. But Dr. Vaughn cannot. [I:52, 58, 71, VII:445 - 452])

4) Three factors are crucial to weigh private vs. public interest under the Fourth Amendment: (1) strength of public necessity for the search, (2) efficacy of the search, and (3) degree and nature of intrusion upon the individual. [W, JJ-2, 17-19]

The Chenkin test failed to exonerate petitioners in that (1) the computer was merely moved to another location which, in fact, was more secure in the eyes of its owners; (2) there was abject failure to protect anything at all and amateur investigators promptly gave up on "sorting out what was personal and what was state property", making inventory-taking, in fact, just another "ad hoc", "post facto" excuse for abuse of access; and (3) search ended with (a) seizure [W] and (b) storage [JJ-2] and (c) the second use of medical and confidential information to harass Dr. Ortega, and (d) the introduction of "tainted fruit" as evidence [17-19] against a witness who wanted to set the record straight.

III. THE ADMINISTRATIVE INVENTORY BY GOVERNMENT OFFICIALS WAS UNNECESSARY, UNREASONABLE, PREMATURE, INEFFICACIOUS, INTRUSIVE, AND VIOLATED PROPERTY AND PRIVACY RIGHTS PROTECTED SPECIFICALLY

BY THE FOURTH AND FIFTH AMENDMENTS.

There was no public property involved. [VII:438 - 444] And,inventory taking proceeded to seizure and re-ransacking for non-contraband material. (That's why the petitioners failed the Chenkin test.)

In Chocallo, there was a file missing. In the instant case, petitioners themselves [W] seized Dr. Ortega's own medical and confidential files (to muddy the waters, to harass respondent into resigning under duress and, with old souvenirs [17-19], to threaten blackmail [JJ-2] in order to silence innocent citizens).

There was no alarm about a missing computer [10] that did not belong to the hospital, nor about training records from universities and community mental health agencies through which residents rotated outside the hospital as the hospital became less varied in clinical

challenges for well-rounded psychiatric training [III:122]. The evaluation reports and examination results from all training centers were under the custody of the secretaries in locked cabinets in the lobby of the Professional Education Department. The computer training contract and correspondence were also on the secretaries' desks. (In fact, the charge of forgery was dropped because of the files the secretaries produced. [II:168 - 171].)

Finally, the Napa County District Attorney turned Mr. Friday down when he sought a court order to take back "missing" equipment, because they were not hospital property. (Offering their serial numbers do not establish ownership. [IV:9]) They were not listed as "stolen" or "lost" but merely discovered as "missing". And they were not identified as "missing hospital property" in the security police report but merely as

"missing property". And the report itself stated [10] that Dr. Ortega's secretary had informed the hospital that he had called (as usual) to tell her that he had taken the computer and printer over the week-end (as usual). (Dr. Laskay was reported to have received the news with glee, saying, "Now, we have got him." He was excused from further cross-examination before that could be verified or denied. [II:21!!])

IV. IF COURT OF APPEALS GRANTED THEM QUALIFIED IMMUNITY, PETITIONERS COULD/WOULD THEN APPEAL FOR ABSOLUTE IMMUNITY

Under the precedent set by Butz v. Economou (viii-8, above), petitioners must first prove, not merely assert, entitlement to qualified immunity.

Qualified immunity can only protect officials from harassment, not as harassers. The "good faith" motives of Napa officials were questioned in great

detail by the Court of Appeals panel, and never taken for granted, like petitioners claim with their footnote. (Otherwise, it would not have promptly turned down their application for stay of its decision while they decided on a "third bite" by petitioning for a writ of certiorari.)

The Court of Appeals decision will protect powerless citizens and require powerful officials to secure a search warrant before intruding on the privacy of the unsuspecting. (Especially that of a peon acting in good faith, whose honesty has never been doubted before. [III:129 - 132, 140])

Of course, no court in the land would deny any lawful officers of government a legal warrant for search and seizure that is not a "fishing expedition". Cannot "fishing expeditions" be reserved for Siberia and other primitive enclaves of "might makes right"?

CONCLUSION

This petition for writ of certiorari is frivolous, designed to, delay correction of reversible errors in dismissing Dr. Ortega over trumped up charges, and impoverish him who is already living on borrowed time. (There was no administrative crises that needed resolution, nor compelling reasons to abridge constitutionally protected liberties and widely recognized rights against search and seizure without a warrant just to secure access to private papers in a "fishing expedition" in search of self-incriminating evidence for unspecified and, in fact, unsuspected crimes.)

A system that cannot run its business without spot checks on its top managers needs to know more about how to choose managers, not more freedom to violate what the Bill of Rights protect. The state must enforce equity as well as

maintain order.

The only suspicion of inequity was raised and then promptly disowned by an ex-con [I:58, 71]. There was no disorder to quell in Dr. Ortega's department. His office was seized when its lock was changed [T-2] two weeks before he moved the computer and printer from another room used by all his medical residents to his office at home for the week-end [10]. That week-end, he was no longer on administrative leave without pay in order not to "encumber the investigation" [II:85], having offered to go on vacation one week longer than he was told it would last. [II:126]

[What follows can also be Appendix I.]

RECOMMENDATIONS

Begging the Court's indulgence, of the four appended decisions in the petition, the last three glossed over substantive issues, the nature of which must be decided by this Court of last resort to

check abuse of executive power abetted by quasi-judicial subterfuge.

Respondent herewith respectfully recommends the following suggestions for consideration and action, if acceptable: Three are reasonably solid and the fourth (single-spaced) unprecedented, but more likely to save tax-payers money and the judicial system's time and space (for filing shorter answers than this to fewer frivolous petitions and self-selected appendices, which excluded Notices of Punitive Action that got respondent into the clutches of the law for the first time in his life).

1) The petition for writ of certiorari should be denied. If the petitioners are concerned about the chilling effect of the Court of Appeals' decision on their ability to inventory government offices, equipment, and papers, there would already have been a policy to cover their tracks: Bureaucrats love to

dictate policy. If they still have none, what they are trying to accomplish is not for the foreseeable future but for the short-term, in their continuing effort to make Dr. Ortega regret that he did not quietly resign (until eventually he had to throw himself at the mercy of this Court.)

2) It is also respectfully recommended that if (i) petitioners will stipulate that the nature of the controversy was as listed in paragraphs "a" to "z" and number 1 to 17 above, and then buried by abuses I to XIII below (Appendix E), and/or (ii) their counsel of record in this petition re-examines the documents quoted herein and cannot dispute them with exhibits, then this Court further certify that not only petitioners, but Mr. Rubin and Mr. Waller as well, have committed injustice beyond abuse of discretion as officers of the court during Dr. Ortega's hearing of his appeal

against dismissal in (a) Mr. Rubin presenting and Mr. Waller accepting false documents as evidence (e.g., the unprocessed computer training consultant contract [16a], while withholding what had been approved [16b], effective July 16, 1981, three months before Notice of Punitive Action [vii]), (b) introducing and accepting "tainted evidence" [17-19] in an administrative hearing against a witness (Dr. Sutton), and (c) Mr. Waller refusing (1) to issue a single subpoena requested by Dr. Ortega [JJ-3, II:143]] or (2) to call as his witness [IV:7 - 9, V:91] those who testified before full discovery was granted by court after the hearing had already started. (If officials can plead absolute immunity, a peon and his witnesses must equally have unqualified right to get heard and not be legally abused by any player-umpire, miscegenophobic or not. [I:67, V:15, 19], Caveat, Appendix E.)

3) Finally, to avoid inadvertence, unwitting or not, and a further round of appeals, might this Court also instruct the Ninth District Court to inform its jury that considerations of qualified immunity cannot enter its deliberations in assessing damages for petitioners' (1) violation of the Fourth Amendment by their illegal search, seizure, storage, and (2) use of non-contraband material in their effort to blackmail respondent and a witness to withdraw evidence under the threat of self-incrimination proscribed by the Fifth Amendment?

4) a) Can petitioners start posting a bond to cover damages to be assessed by a jury after this Court denies their "good faith" defense, so that tax-payers do not have to pay for delays to consider whether they are going to try another round of appeals? Even the total accumulated salary that they withheld for six months from respondent might be sufficient to deter them, if it was equally divided among the three "et. al" petitioners, and withheld semi-annually as long as they continue to delay resolution of this controversy which tolls the bell for a career as surely as capital punishment does for a criminal.

(Cat's paw but not clawed, Dr. O'Connor had gravely warned Dr. Ortega's residents, who are trained to hear unspoken messages with a third ear -- (as cited in the Introduction to Argument herein) -- that justice delayed may be justice for the already dead.)

b) Hereafter, instead of uncommitted taxpayers, can all four petitioners be held liable for accumulating interest in respondent's back salaries, starting with the effective date of this Court's denial of their wanton petition, should respondent be reinstated as Chief of Professional Education thereafter?

Respectfully submitted,

Magno J. Ortega

Table of Content of Appendices follows.

Addendum: As an M.D., respondent would like to suggest that, like the biological immunity that protects our bodies, all transfers of sovereign immunity be absolutely relative, even if more expensive to the State.

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ORIGINAL DOCUMENTATION FOR REPLY ABOVE

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First Amended Mandate Petition,p.31(29)

APPENDIX-1

A. ESSENTIAL LIES AND IMPLICATIONS

It is clear that degrees of immunity cannot be decided if facts cannot be pinned down. It is therefore revealing when petitioners try to qualify somehow for qualified immunity by lying baldly.

Petitioners admit that "Three personal items involving a female medical resident were removed as relevant to the pending personnel investigation against the respondent." Her name now is Dr. Sutton, but the investigators could not have known that, from those "personal items". Her name as a resident was her ex-husband's. Only after she wrote the hearing officer could they re-search Dr. Ortega's personal property to steal those items. Since she was in the same graduating class as Dr. O'Connor a decade ago, what they selected were not work-related.

Why did petitioners bite [17-19] their "tainted fruits" yet keep hiding them?

APPENDIX-2

The implication of petitioners' selection of what they assert without explanation as "relevant" but that they cannot now be silent about is that they tried to buy Dr. Sutton's silence with [JJ-2] threats of legal blackmail. And that what the ex-"medical resident" had to say and [P] did write might be of present interest to this Court:

"October 23, 1981

Dear Sirs:

> Dr. Ortega has organized and directed an outstanding psychiatric residency training program that has produced many extremely qualified psychiatrists who now staff Dept. of Health and Dept. of Corrections institutions. . . . The quality of training given has enabled the graduates to treat the most difficult patients and to assume positions of leadership within the Departments. . . Finally, the rate of passage of specialty board examinations of the graduates has been excellent and has exceeded the rate of most other residency programs. . . . (I)t is totally inappropriate to fire him on the basis of the charges presented(:). . .

1) Allegations concerning the computer. I feel that it is not improper for residents or other em-

ployees to donate money to purchase equipment that they would like to use in their work or training which the state cannot provide. . . Furthermore it is always possible to disagree or refuse his suggestions.

2) Payment of consultant to train residents on the usage of computer. For at least the last ten years all consultants have been paid for a full days salary when they come to give a guest presentation. . . Many times travel expenses would far exceed the amount they are paid in the customary fashion...Dr. O'Connor and other hospital administrators have been well aware of this practice for many years.

3) Allegation that Dr. Ortega 'took home state property'. . . In the first place, Dr. Ortega's home has been regularly used by residents as an off-campus training site for at least ten years. . . Dr. Ortega designed the architecture of his home in order to facilitate group meetings and other training sessions.

4) It is alleged that Dr. Ortega deceived Dr. O'Connor into signing hospital requisitions to purchase minor parts for the computer. I feel it is Dr. O'Connor's responsibility as an administrator to review materials before he signs them.

5) Charges of sexual harassment. . . In these ten years I have never heard of any incidents of 'sexual harassment'.

In summary. . . These irregularities

that may exist are relatively minor when you consider the overall performance of Dr. Ortega and in no way justify the decision to dismiss him.

I hereby certify under penalty of perjury, etc."

Of course, they have to mention that she was involved, because it will "all come out in the wash", so to speak, and at least petitioners can say they had not been silent about her.

Petitioners had to identify her as "medical resident" because (1) to identify her by her name at that time (2) would raise awkward questions now about (a) re-ransacking what they did not have the right to seize, search and (b) store in the first place.

[If a wrongly worded warning can save criminals from any prosecution, surely wrongful acts can reverse dismissals.]

After this letter to the hearing officer, Dr. Ortega was additionally charged with having been importunate with a social work intern, who testified [I:39] it was more than three years

before [vi] the Amended Notice of Punitive Action was sent to Dr. Ortega (on the eve of the hearing). She was not even recognizable to him when she appeared to testify.

But the threat to desist, or else, came to Dr. Sutton (through Dr. Ortega) after the first day of hearing, when both charges of sexual harassment had already been heard (and Mr. Friday, Mrs. Owen, and Dr.Vaughn had testified, the last twice [I:139, 72, 44 and 97, respectively]). Dr. Sutton's own privacy had to be violated by violating another's to "rebut" her declaration and keep it off the record as a rebuttal to what the hearing officer, Mr. Waller had scribbled and preserved in petitioners' Appendix. As Mr. Waller's "defender" (and his master's voice [IV:5] in Appendix B hereunder), Mr. Rubin in the role Napa's counsel, sent Dr. Ortega [JJ-2] the following threat to convey to

Dr. Sutton:

"Oct. 30, 1981

Dear Dr. Ortega:

> . . . (I)f you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. . . In the interest of fairness, however, we are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. . . Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination.

Very truly yours,"

Above as below are immune legal abuses.

B. HOW TO KEEP FACTS OUT OF HEARINGS

Mr. Waller stopped Dr. Ortega asking constitutional questions of Dr. O'Connor about [II:101/15] WHEN he decided to use the photograph by ruling that they are personal and then "testifying" that only Mr. Rubin [II:101/18-19] decides WHAT is used and [II:101/23-25] "is handling this case as a legal representative of the department and he is a Deputy

Attorney General".

Which also implies that even during the hearings [IV:60] petitioners already had doubts whether they can prove "good faith". (All the petitioners are asking now is another chance to try proving it, with the blessing of this Court, at Dr. Ortega's expense. If the state can't prove "good faith", the Attorney General won't be any worse off. And there's always a chance Dr. Ortega would have a fatal stroke.)

The following also tends to cloud the need for any immunity for quasi-judicial hearing officers and the "prosecutors" -- (who are defending the state in administrative appeals against punitive action in California in civil service disciplinary proceedings) -- if the net result makes officers of the court co-conspirators. Neither needs protection from frivolous suits as much as the

victims of such a misalliance.

It is [IV:3-7] the beginning of the 4th day of hearing. The "prosecutor" is Deputy Attorney General Rubin, who was then counsel for Napa, now counseling the hearing officer, Mr. Waller, about how defensible his rulings will be when Mr. Rubin defends them before the State Superior Court, which he is now doing.

> Dr. Ortega: . . . I think there are precedents to show that a party can ask for his witnesses without being bound by the fact that they have been called by the adverse party before. As you will remember during Dr. O'Connor's cross-examination you limited him to what Dr. Rubin -- Mr. Rubin, wanted him to testify about and he only wanted to testify about one allegation in fact. I think I should examine him about directly what other matters besides those since it is on his authority that I'm being dismissed. Our relationship goes a long way, and I think that is pertinent to what has happened. He was a resident in my program, and I think what has happened between then and now are of relevance. I think the matter of relevancy should be decided after the witnesses responded to questions and then the Counsel can object.
>
> Hearing Officer: You wish to comment before I rule, Mr. Rubin?

Mr. Rubin: . . . (H)is attempts here to in a sense disrupt the proceedings by totally changing the rules shouldn't be sanctioned by you. And I would very strongly urge that you not permit this to be undertaken, and WE are confident that this record will stand up in any further judicial proceedings if that's necessary. And we're satisfied that despite the fact Dr. Ortega's representing himself and that appears to be a severe handicap for him, that you have done everything you could to protect his rights, to give him every opportunity. And as I, say we're confident that should WE be called upon to defend that at some subsequent proceedings, that the record is clear he's been accorded every possible protection.

Dr. Ortega: Mr. Waller?

Hearing Officer: Well, I'm not going to rule finally on that issue of recall at this time. I'm going to adhere to my original ruling this morning and that is that we will not recall witnesses at this time. . .

Dr. Ortega: I think it is a mistake to think of it as recall, because they have been called once, but called by their own Counsel. I'm calling them for the first time, so this is not recall.

Hearing Officer: Well, I don't care to discuss that issue further at this time. We'll discuss it, as I said, later before we close the proceedings. (Is this legal torture?)

With pledges of Mr. Rubin's masters' future support, one does not have to be an alienist to predict [V:91] what Mr. Waller's conclusive ruling was.

"Biased decision-makers are constitutionally impermissible, and even the probability of unfairness is to be avoided." Applebaum v. Bd. of Directors of Barton Memorial Hospital (1980) 104 Cal.App. 3d 648, 163 CR 831 at 836.

For true peons, "the ALRA incorporates procedural safeguards of the NLRA including the separation of prosecutorial from adjudicatory functions". Tex-Cal Land v. Agr. Labor Relations Bd. (1979) 24 Cal.3d 335, 156 CR 1.

C. BIASED RULINGS AND FALSE FINDINGS

Earlier, before Mr. Waller realized how easily controvertible their testimony are, the hearing reporter (who commutes with Mr. Waller) recorded [I:8/11-15] this exchange:

Dr. Ortega: May I ask when you ask

for (witnesses) and I've no way of finding out how to defend myself against their testimony, can I recall them afterwards?

Hearing Officer: Certainly, you may recall any witness you want.

By noon of the first day of the hearing, Mr. Waller knew he had erred in [M] saying "Oh, we have what we need here. This won't take long" even before the hearing got underway. Having promised access to all witnesses that morning, he needed to bring them in fast. Did he, during [I:71] a long recess, as Chief Hearing Officer, free up 11/4-5/81 in order to leave less time to prepare for [vi] the surprise witness whose complaint was not received until the eve of the hearing? And then decided the interval [II:3] with "miscontinuance" was to the State's disadvantage and therefore decided [II:52, 143] to deny all subpoenas?

That afternoon, when he learned that the Superior Court was going to hear Dr.

Ortega's petition for discovery on Monday, Nov. 2, he pounded [IV:60] on the table, like Mr. Khrushchev, but without the shoe, and [I:88] shouted "This hearing is discovery!". Dr. Ortega entered that as Mr. Waller's opinion on the record but it was reported [I:80] as "practice of discovery". He had no intention whatsoever of honoring the intent of his Agency's discovery procedures. (Or of the court's discovery order later: With the prompting of Mr. Rubin who was privy to what Dr. Laskay's investigative notes contained, Mr. Waller talked Dr. Laskay into [II:150] defying the court order to produce all such notes and furnish them to Dr Ortega.)

Where Mr. Waller had not bothered to take notes before, he started scribbling his "findings" furiously soon after that outburst. Later, did he change [vi] "social work student" to [ix] "social

worker", mindful that only when employment is at risk is [OOO] sexual discrimination subject to punitive action? Neither complainant was known to Dr. Ortega before coming to Napa, and neither came to be tenured workers but as students. [VII:453-62]

Mr. Waller's proposed decision [ix] of March 8, 1982 does not say which of the alleged "causes" for dismissal were supported after [III:21] Napa had "completed our case", when hearing officer insisted Dr. Ortega be cross-examined while his witnesses waited to testify:

Nov. 17, 1981 transcript, p. 22:

> Hearing Officer Waller: "We're going to have you called as a witness, and we're going to identify what are the real issues in this case. We have broad boundaries in the discretion (of the hearing officer) in an administrative hearing.
>
> Dr. Ortega: I don't think you have that discretion.
>
> Hearing Officer Waller: I don't care to argue. You'll be called as a witness. Dr. Laskay, you'll be

excused.

Dec. 30, 1981 transcript, p.91:

Dr. Ortega: Mr. Hearing Officer, when Dr. Gandhi was called, I objected because she was my witness. And so I want to call her now.

Hearing Officer: Well, I think this is as good a time as any to settle that issue. You were advised at the time that it was well established procedure of the State Personnel Board to call a witness only once. No matter which party called the witness. And at that time the witness would testify to all relevant facts. Therefore I am not going to continue this hearing by calling all of these witnesses or any of them for the second time. So your motion to recall these people is denied.

Dr. Ortega: We have a precedent in this hearing about recalling people, so that's not true in the first day of the hearing. It's different now that I am presenting my defense.

Hearing Officer: No, you were put on notice fully and completely, Dr. Ortega, that these people would not be recalled. You choose to ignore that warning as you have many others. And therefore those people will not be recalled now. If you have other witnesses that have not testified in this matter, you may call them.

Dr. Ortega: Mr. Hearing Officer, one of the(ir) witnesses was recalled on that first day.

Hearing Officer: I don't care to argue it, Dr. Ortega. Do you have further witnesses you want to call or do you want the matter submitted.

Dr. Ortega: No, I don't want the matter submitted.

The specific findings of the Hearing Officer for his proposed decision (pages A-10 to A-14 of petition) which was accepted "in toto" by the CSPB are under challenge in State Court on the following grounds:

i) vs. III-V (Petition's A-12): The decision must be deducible from the circumstances to which the law refers which can be known to all the parties. [VII:453-62]

Both complaints of sexual harassment were made after Dr. Ortega had already been dismissed by phone, which means neither complainant felt harassed but were responding to earnest solicitation for any charges that can be written up to force Dr. Ortega's resignation. Furthermore, neither were Dr. Ortega's co-

workers nor supervisees. Finally, their complaints predated the Departmental Sexual Harassment Policy Guidelines -- (allegedly distributed with paychecks on March 30, 1981, to excuse omission from discovery documents, but not all its post-facto implications) -- which also excluded dismissal from its own list of sanctions (to thwart miscegenophobes?):

> "3. Departmental Responsibility and Employee Rights and Responsibilities: (The right to a discrimination-free work environment, the right to file confidential complaints, the right to be represented, etc.) Employees should be advised of their individual responsibility to inform the harasser that his/her behavior is unwelcome, offensive, or highly inappropriate. Individuals should also be encouraged to file timely complaints.
>
> "5. Potential Consequences for the "Harasser": This section to highlight the types of disciplinary actions, such as letters of reprimand, suspension, demotion, as well as possible civil liabilities for both the harasser and the department.

ii) vs. VI: Government must never coerce any person except in the enforcement of a known rule. [V:11-15, 67-73]

The only provision in the often revised State Administrative Manual about integrated data processing refers to purchase by the state of a computer system costing in excess of $75,000.00. In the present instance, no state money was disbursed, and the sub-purchase orders totalling $1,388.00, including taxes, and approved by Dr. O'Connor were way under the limit above which feasibility studies were required. (Even so, Dr. Ortega had submitted [D] a feasibility study prepared by the Research Department of UCSF [III:137-138] long before the computer training consultant contract was drawn up.

CALIFORNIA STATE PERSONNEL
ADMINISTRATIVE MANUAL
ELECTRONIC DATA PROCESSING
STATUTORY PROVISIONS

PROCEDURES (Revised 2/6/81), 4819.3:

"1. Section 4 of the Budget Act requires that procedures set forth

in the State Administrative Manual be met and followed prior to the expenditure of funds by any State entity for any electronic data processing activity. The purpose of this section is to implement these provisions. . . . In addition, the provisions of this section shall not apply to the University of California, the State Compensation Insurance Fund, the community college districts, agencies provided for by Article VI of the Constitution, or the Legislature." (It is evident that training computers are exempt from "State Rules and Regulations". [II:49-50])

"4. It is the intention of the Department of Finance to exempt from its review and approval all EDP FSRs (Feasibility Study Reports) except for those projects that have statewide, interdepartmental or intergovernmental impact, non-standard or extensive communications, or unusually large software or equipment acquisition costs, PROVIDED that the chief executive officer of the State entity (hereinafter called the department director) has approved the FSR. FSRs for all proposed EDP expenditures of $75,000 or less are automatically exempt from the Department of Finance's review, but each FSR must be approved by the department director prior to the expenditure of funds." (Dr. O'Connor approved [13a,b] the sub-purchase orders.)

The other findings -- (II: arrogance, abrasive personality, did not get along

well with Dr. O'Connor; VII: Dr. Vaughn "was shocked when he found he would not be paid", "contend that it was because he refused to contribute to the computer"; VIII: "agreeing to pay amounts in excess of authorized rates for such services", "contract was later disapproved"; IX: mislead Dr. O'Connor, and X: "assertions that he was denied prehearing discovery . . . were without merit", etc.) -- are themselves without merit and cannot be documented from the evidence presented or the oral testimony during the hearing.

(They were categorically denied, and not contested by cross-examination, in Dr. Ortega's written testimony [VII:370-507], which was demanded [V:111] over his protests and then disregarded. If he did not get along with Dr. O'Connor, it is highly unlikely that Mrs. O'Connor will have Dr. Ortega for a tennis

partner. And it is as unlikely that Dr. O'Connor can be misled by someone whose motives he suspects. Co-terminally, all "contributors" and both Dr. O'Connor and Dr. Laskay testified [II:103/21 and III:9/12, respectively] that there was no coercion to "contribute" and there was no charge of coercion at any time.)

D. ARGUMENT

In law, a decision cannot depend on any special knowledge or "the capricious 'ipse dixit' of authority" that is not even made explicit as a matter of public record in the body of the decision itself, or by a tribunal's momentary purposes, no matter how impartial it was -- (the hearing officer was not [M]) -- and the particular values it attaches to different concrete aims, including the preferences it may have concerning the effects on different people.

[E] An ex-executive, then resident, wrote:

A. Overtime Compensation. This allegation is completely out of focus and perspective. It fails to recognize . . . the active participation of the residents, in conference with Dr. Ortega, to seek ways and means of raising money to purchase a mini-computer. The(ir) interest . . . arose, in large part, from my work with similar computers under the direction and supervision of Dr. Enoch Callaway, Director of Research . . . University of California, SFO. This work was one day per week in January, February, and March of 1981, and was part of my residency in Psychiatry . . . This led to our conferences previously mentioned. Together we decided on the overtime work for pay approach mentioned in the allegation . . . It is not at all clear that Dr. Ortega violated any...policies or regulations since nothing was really done.

C. Sub-paragraph 4 of this allegation states clearly, succinctly, and sufficiently all that needs to be said about this allegation: "4. The contract has not been approved and Mr. Saeedi has not been paid." I would ask then this simple question: Where and what is the evidence or substantiation for any punitive action when no one has a basis for complaint? Is the State Mr. Saeedi's advocate for this action?

E. Deception. This entire allegation is patently absurd for a responsible executive director or administrator to present. It reflects as much upon the ineptness and inability of the executive to administer and to manage as it does upon the subordinate to present documents for consideration and signature.

Sub-paragraph E 1) states: This was done under the guise of an emergency and after you refused the Executive Director's order to go through the chain of command." Are we to believe that the Executive Director is unable to give cogent orders? Further, in this instance, what is the chain of command? (I believe it to be Director of Professional Education to Executive Director.) Again, as in previous allegations, the sub-purchase orders were never executed, no money was spent and nothing was purchased. (Now if you were fishing, your catch would have escaped because you attempted too early to pull the hook.)

Next, we read in this allegation direct statements regarding Dr. Ortega's intentions with Dr. O'Connor to "deliberately mislead", "actively deceive" and to not follow NSH policy and procedure. Now, I ask you, if Dr. O'Connor is fully aware of these policies and procedures, why did he not cause this interchange to come to a halt and why did he not counsel Dr. Ortega on his apparent, patent and even blatant disregard for these policies? It is apparent to me that Dr. O'Connor was a willing participant in this matter, neither misled nor deceived until some subordinate later brought this to his attention.

Paragraph F 1) alleges that Dr. Ortega removed the computer and printer from NSH on Augist 15-16, 1981, without authorization and took them to his home. Ownership of this equipment has not been established; therefore it seems ludicrous to allege that authorization is needed for one person to remove personal property from one place to another. It does not belong to NSH or to the State

of California; it does not belong to any indivdual who has filed a law enforcement or legal complaint and there appears to be no valid reason for accusing Dr. Ortega of anything.

G. Leave of Absence . . . One thing is clear through personnel policy and Dr. Ortega's previous actions: Dr. O did have the basic authority to place the medical resident on a leave of absence . . . I do not understand nor are here given any explanation of why it became necessary for someone to (a)void a legitimate, duly authorized Leave of Absence "in order to honor the State's obligation to an employee". This smacks again of administrative incompetence and a real failure of the executive director to support a department head. Furthermore, it is not at all clear what "inappropriate personnel practices" were carried out by Dr. O...

I. Sexual Harassment of Female Resident. This allegation is nearly unbelievable in California . . . To allege misconduct of an American citizen ten or more years after the alleged misconduct is so ludicrous, so far out of the bounds of common law as to be unworthy of addressing by this hearing . . . Do we ask why no other similar incidents are mentioned?...Or do we question why this lady has continued a close professional relationship on the staff of the Department of Professional Education in the light of her serious allegation?

STANDARDS:...He is uniquely incisive, stimulating, challenging, and especially is he personally professional. For each resident trainee Dr. O applies himself to assure the best possible training program. In no other residency program

with which I am familiar is the Professor so intimately involved, so fully committed to the training of his residents...

This hearing has, in our view, no other recourse than to reverse the improper dismissal of Dr. O. and to reinstate him. . .

E. PSEUDO-JUDICIAL REVERSIBLE ERRORS:

I. The documents on which the charges were based, which the Skelly decision demands must be in the employee's hands before an informal meeting with the employer "initially imposing the the discipline", were not made available even after the hearing had started. [I:4, II:1,67]

II. Continuance was refused and hearing started after an amended notice of punitive action was sent on the eve of the hearing. [I:37, 43, 80, 88]

III. A court order [H] to produce missing documents was defied [II:150] at the instigation of the hearing officer who, in anger at the court presuming to hear Dr. Ortega's petition for discovery, started

[IV:60] pounding the table and screaming, "This hearing is discovery." [I:80, 88]

IV. Discovery of documents (consultant contracts, investigative notes, etc.) was incomplete and had to be demanded during cross-examination of witnesses testifying about false evidence introduced as exhibits. [II:93, 127, 150; III:39]

V. All requests for subpoenas were refused, and some witnesses who want to testify, whose testimony are known to contravene Napa's case, were denied to Dr. Ortega. [II:52, 143]

VI. After Napa had [III:21] presented all its witnesses, and its last (Dr. Laskay) still under cross-examination, and while Dr. Ortega's witnesses from great distances are waiting to testify, the hearing officer, Mr. Waller, himself [V:96] demanded, contrary to specific provisions of the Evidence Code, that Dr.

Ortega take the stand as an adverse witness, and submit to cross-examination, whose content he kept suggesting to Napa's counsel, Mr. Rubin, "so we can actually find out what the issues are in this case". [III:21-22]

VII. When Dr. Ortega started to testify after testimonials from witnesses who were screened as to whether they were privy to the controversy (i.e., had they testified as part of Napa's case), he was [V:110] interrupted and [V:111] told to submit his testimony in writing and then be cross-examined again, but [VI:2] was not, in order [V:111] not to re-open "a can of worms". [ix, x]

VIII. The hearing for [viii] cross-examination was advanced before [VI:3] Dr. Ortega could finish his written testimony but [VI:4] oral testimony again was refused and [VI:5] the hearing adjourned for good since there were no cross-examination questions.

IX. The exhibits [A-000] sent along with the written testimony were disregarded in [ix] the proposed decision.

X. The "findings" on which the decision to dismiss was based consisted solely of [I:12-121] oral testimony by state witnesses (1) before the court ordered that all notes and documents be produced and furnished to Dr. Ortega, and either (2) not cross-examined pending discovery or (3) subsequently [IV:3-10] denied to Dr. Ortega even as adverse witnesses.

XI. The proposed decision and the "findings" on which it is based was not sent to Dr. Ortega, before it was accepted as the Agency decision, contrary to explicit provisions and implicit intent of law with respect to such proposed decisions. GC §19582(b).

XII. Some of [ix] the findings were not about allegations included in [vii] the original or [vi] amended Notice of Punitive Action, but the hearing

officer's recommendation to punish Dr. Ortega by dismissing him was [x] accepted by the Agency.

XIII. The hearing officer had highly idiosyncratic ideas of the intent of the state with regards [V:72] computers and [ix] sexual discrimination, [II:52, 143] subpoenas and [II:150] discovery, [I:10/20, 88/24] discomfort of the witness (mollycoddling) vs. [IV:3-9] rights of the accused (fact-finding), [I:88, II:21, V:96] quasi-judicial discretion and [V:110-11] abuse of the judicial process, [xv, xvi-a to -f] mitigation (none) and [V:15] punishment (extreme). [E, P, III:23 - 142, IV:54 - 87, V:4 - 109]

(CAVEAT: Mr. Waller cannot be all that bad or he would not be Chief, Hearing Office, SPB. Is it Dr. Ortega? [I:68])

SELECTED/CITED EXCERPTS FROM THE RECORD

[III:122] Hospital director from 1964·

Q: In all the time you have known me, have I deceived you?
A: Not that I am aware of.

Q: Did my --
A: You irritated me at times, but never deceived me.

Q: Did my department change during that time?
A: Yes, it grew considerably.

Q: While the hospital was shrinking?
A: While the hospital was shrinking, and I will say that I always admired you for that, that you were able to maintain this residency program under the opposition of the Department of Mental Health in Sacramento.

In fact, as far as I know, you were the only one that maintained an accredited residency program in a State Hospital in California.

[III:131] A former resident who could not live on the training stipend:

Q: Dr. Jackson, without any prompting on my part, you came to me and said you knew what I was doing about the contributing. What did you tell me?
A: I don't know if I was so bold to say I knew what you were doing, but I knew that I -- that the one thing I thought the overall effect was that the investment of time and money and that the level of attention and involvement in the computer would be heightened, and that if a computer suddenly appeared, it would probably be treated with some disinterest unless there was an active involvement and interest on the part of the residents.

This was, I think, an effective way of heightening and making some kind of an investment in it in either time or money.

[9b] As a hospital doctor, he wrote:

> "Although I'm no longer directly involved with the program, I spend close to 10 hrs/week at the department and suddenly, the loud griping and voluminous bursts of outrage at Ortega and all his craziness are being replaced by whispers and quick glances over-the-shoulder. There is fear now where there used to be confusion. The atmosphere is markedly different; the warmth is gone, replaced by a chilly wind. The fire is out.
>
> "Opportunities are being lost, futures more contained. There is more equality and less fairness. Formerly, a resident was put on leave for avoiding an assignment; now a resident's positon (i.e., job) was threatened for seeking an assignment.
>
> "I am glad to have been in Rome when mythology was still live and life itself was mildly raucous before the ecclesiastics took control and watched it die."

[V:77] An alumnus who came to the hearing:

Q: Your experience with me over the years that we have known ech other, can you say something about that?
A: I think you're autocratic. It's the first word that came to mind. Your're also an excellent teacher, one of the most creative that I've met.

Q: In that -- I'm sorry, Mr. Hearing Officer. In your -- can you elaborate further on the autocracy?
A: In all the time that I've known you,

you have made decisions about who should go where and do what and when. Seemingly regardless of what they wanted. Many residents have resented that. I've talked with many of them. I myself have resented that at times and in all that I never felt, and even in retrospect never felt that any of those decisions were made for other than concerns about their education and turning out quality psychiatrists.

[IV:19] Mr. Friday's better respected "second banana":

Q: How is the contract approved?
A: It's approved both locally and at headquarters.

Q: What happens if it is not approved locally?
A: Then it remains unapproved and to my knowledge you would have severe problem.

Q: What happens if that disapproval was protested?
A: Well, I believe then there would be a meeting of the minds between the protester, the reviewing party probably at headquarters and the person that needs the consultant.

Q: So you'd have a three way meeting at least?

. . .

A: I would -- am speaking from my other case. I would assume there would be this, yes.

[IV:54] First year medical resident:

Q: Do you remember meeting with Dr. O'-Connor at the start of the investiga-

tion?
A: Yes.

Q: Do you remember his mentioning that the person who started it stipulated that if the administrator didnot look in his complaints, State investigators would be called in?
A: Yes.

Q: Do you remember Dr. O'Connor talking at great length about his experience under my directorship?
A: Yes, he had mentioned that he had come here because of your -- the novel way you had let him interview the patients during his application time.

Q: And he had been accepted in many other places?
A: Yes.

Q: Do you remember his talking about some unhappiness he had also?
A: I think he mentioned about your telling him to go to Mt. Zion for (rotation) and he was not happy about it because of the commute or something but after going to (rotation) he was glad he had gone through it and it had helped him pass the boards. (Reporter heard "meditation" for "rotation" both times!)

. . .

Q: Do you remember seeing Dr. Vaughn the first day of your orientation in July?
A: Yes.
Q: Do you recall my telling him he should be in Highland?
A: Yes.

Q: At the meeting with Dr. O'Connor did that resident worry about reprisal?
A: Yes.

Q: Did he worry because Dr. O'Connor was

oh, so positive that all would turn out well?
A: Yes.

Q: Did Dr. O'Connor answer him that Dr. Ortega was not that type of a person?
A: Yes.

Q: Were you told by the same resident(s) after the meeting to expect questions about sexual harassment?
A: We had gone from the meeting with Dr. O'Connor. We went to our usual conference room and were discussing about the investigation. I men the -- your leave, and he ha said expect questions about -- "I've something else for you" he said. He told us and said expect questions on sexual harassment.

. . .

Q: While all this was happening none of you could see me; is that right?
A: Yes, we had received a memo that we could not see Dr. Ortega during office hours.

Q: And yet you are not on a 40-hour week, are you?
A: No.

Q: Did Dr. O'Connor reassure the residents that UC Davis would not take over the training program?
A: Yes.

Q: Has there been a significant increase in sick leave since my dismissal?
A: I don't know.

Q: I have to ask these questions. Did the Hearing Officer accuse me of harassing him and pounding the table on the first day of the hearing?
A: Yes.

Q: Did he promise witnesses will be returned for Cross Examination?
A: Yes.

[V:41] Dr. Linn, Dr. O'Connor's ex-boss:

Q: If the computer was alleged to have been purchased because of coercion on the basis of coercion of contributors who happened to be the residents, would you investigate the Chief of Professional Education?
Q: An allegation of that sort would be a very serious one and would certainly merit looking into, yes.

Q: How would you proceed?
A: If there are still special investigators present at -- in State service as they were when I was the director, I would assign that investigation to that individual.

Q: Why him?
A: Because his training is in criminal type investigations and this is an allegation which is very close to a criminal allegation here.

. . .

Q: If you did not have a special investigator available, what would you do if an investigation is necessary.?
A: Well, I would obviously try to choose the most unbiased group of individuals that I could find. One who had, perhaps from another hospital that had no connection with any of the parties involved.

[V:57] Second year psychiatric resident:

Q: Did Dr. Brannick announce that Dr. O'Connor officially terminated Dr. Ortega

on the first of September?
A: It think it was on Tuesday when we were having our regular conferences that Dr. Brannick told us as acting Chief of Professional Education that Dr. O'Connor has terminated Dr. Ortega.

Q: Did Dr. O'Connor mention that he had offered Dr. Ortega the option of resigning?
A: Yes.

Q: And now that he was dismissed, he was not eligible for time and benefits?
Q: If I remember right, one of the residents asked if you still have those benefits and Dr. O'Connor said since you refused to resign then you, and you were terminated, then you don't, you are not entitled to the benefits.

Q: Did he say that he consulted with other officials before deciding to dismiss me?
A: Yes.

[V·82] A senior psychiatric resident:

Q: ...Simply: Why would you give $80 that you did not have at the time and that you did not have until July, for a computer?
A: Well, it's for educational and research purposes, and I was -- and I am next on the line to do research, so I am interested in it.

Q: You expect to use it in your research?
A: Yes, I used it recently. I have a -- most of the data because I'm doing research on immunology and making some correlations with psychosis.

Q: You expect to finish that research?

A: With the help of Dr. Callaway of UC (San Francisco), yes, I hope so.

Q: You expect to use the computer for that?
A: I expect to use it more often.

Q: When was the last time you used it?
A: Just recently. In your house. I don't -- maybe a month ago.

Q: Do you want your $80 back?
A: No, I voluntarily contributed it for the computer.

Q: Incidentally, is it costing you more to attend these hearings?
A: Yes, it would.

Q: How much have you spent of your own money to attend these hearings?
A: Oh, I've taken vacation time.

Q: How many days?
A: Since the start of the hearing.

Q: In cash, how much would that be?
A: I'm not sure. Would it be -- if it is $10 or $11 per hour, so I took vacation. I don't know how many days already.

Q: And you did not have that money in July to give?
A: No.

Q: Why do you -- why do you come?
A: Well--

Q: This is not a movie.
A: I -- I feel I have a lot of strong feelings about this. I don't understand why you were dismissed and why so precipituously. I still don't understand.

Q: You've been to all these hearings?
A: Yes.

Q: And you cannot understand from what has happened so far?
A: I don't know.

F. CONCLUSIONS

The Notice of Punitive Action of Sept. 14, 1981 lists as "causes" under Govt. Code Sec. 19572, only some subsections:

> (b) incompetency or lacking ability, (c) inefficiency or [III:74] excessive delays, (e) insubordination or disrespectful conduct, (f) dishonesty or lying or stealing, (o) willful disobedience or [VII:523] violation of prohibition, (p) misuse of state property, and (t) other failure of good behavior [III:140] which causes discredit to his employment that can be indisputably established.

Ex-hospital director still at Napa:

> Dr. Ortega: Did I ever bring discredit to the hospital? [III:126]
>
> Dr. Spratt: Not that I am aware of.

Hearing Officer Waller has to interpret Govt. Code Sec. 19572 like the Kremlin does its Article 58 of their Criminal Code to find cause to dismiss someone against whom no one has lodged a

grievance in 17 years.

[Surely absence of confrontation with accusers can dismiss all dismissals.]

Russians do not have the right to subpoena/confront state witnesses.

Their criminals also do not have the right to a professional defender. In our courts they do, but only if they are poor. Those impoverished by state action cannot obtain legal redress, unless their livelihood is equated with their limbs, and the court balances the power of the state by assigning legal counsel. "Equality" with tax-subsidized attorneys before civil law can only be offered to the rich, until we have enough lawyers for all the needy. Unless the Supreme Court turns down all appeals except to grant officials absolute immunity, after qualified immunity has already been recognized by lower courts. Butz v. Economou, (viii) above.

G. OTHER RECOMMENDATIONS

To be fair, Mr. Waller may have absolute immunity as hearing officer for impoverishing Dr. Ortega, but as CSPB's Chief Hearing Officer he has grossly misrepresented the intent of the statutory provisions about electronic data processing by the California State Personnel Department Manual and the guidelines about sexual discrimination, and subtly [II:150] suborned (sic) Dr. Laskay to defy the court order to produce all investigative notes by leading him to offer to testify entirely from memory on Nov. 16, 1981.

1) Should his employer's contributions to Mr. Waller's retirement be withdrawn since he deliberately deceived the public and the agency about his role and his "findings" in "doing his job"? A playing umpire is no umpire, especially when he supports his quasi-judicial rulings and de-

cisions with insupportable opinions about discovery rules and court orders, statutory intent and content; or agency policies and practices.

Dr. Laskay is now dead and his death and Mrs. Owen's "retirement" had been used by Mr. Rubin as grounds for his motion to dismiss Dr. Ortega's petition for writ of mandate for reinstatement. Mention of Mrs. Owen was of course a legal red herring. We will be caught in another legal treadmill. Mr. Rubin knows that Mr. Waller interrupted Dr. Ortega's cross-examination of Dr. Laskay by violating the specific provisions of Evidence Code Sec. 776, which required counsel, not hearing officer, to call an adverse witness to the stand. [III:21, V:96]

2) Dr. Ortega having been deprived of his "day in court", -- (no ruling about rehearing will allow him to regain that right with Dr. Laskay

out of reach for cross-examination), -- can this Court rule that the CSPB hearing was null and void?

Mr. Rubin's first motion to dismiss Dr. Ortega's petition was denied, but he has reserved the right to raise it again, not having produced proof that Dr. Laskay is dead. He is, technically, but the Attorney General sent Dr. Laskay's notes to the Federal District Judge after he had ruled against Dr. Ortega (to quiet his doubts, no doubt). [First Amended Petition, p. 31] Was this a good "good faith" tactic?

3) Can Dr. Ortega's jury to assess damages be instructed by another District Judge by order of this Court of last resort?

Reckless disregard for the law is demonstrable, legal abuse extreme, but the remedy is expensive to the victim in borrowed time and unborrowed money. Even an award of actual damages will not

return him to "status quo ante". More importantly, human nature being what it is, there will be other more helpless victims who need not be victimized, if the officially corrupt and righteous can be fairly and judiciously "check-mated" by the incorruptible and unvengeful.

ADDENDUM: If respondent may be permitted one historical, and last, comment: The State started out as a playful, not an adversarial, enterprise. It was for fun, with fun, and in fun, not to institutionalize a pecking order. (Absolute immunity may be necessary to keep order in the prison system, but qualified immunity is not necessary for hatchet men in employment. Especially in California, where the hearing officer's decisions are automatically defended by the Attorney General while the ex-employee must fend for himself.)